DIVORCE AND MORALITY.

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IT IS sufficiently difficult even in ordinary matters to distinguish the border line of law and morals but it is doubly so in regard to the question of marriage and divorce. Generally speaking, wise legislation does little more than sweep away obstacles to right doing, and protect men as far as possible from liability to wrong doing. The legislator will erect a railing or a high tower to protect sightseers from vertigo but will not erect a cage to prevent their committing suicide. The State exists to promote the "good life" in the Aristotelian sense but cannot at all directly interfere with the private life and motives of the citizen. For example, the State takes cognizance of marriage; the question of unions outside marriage concerns not the State but (if anyone) the moralist.

There is, however, a certain confusion in the public mind as to the respective functions of the lawyer or legislator and the moralist in regard to marriage and divorce. The authority of the Church is rapidly disappearing; the Church claimed the ethical sanction which the modern moralist claims though on different grounds. The time has therefore come to reconsider the attitude of the State and how far it is entitled to take over the powers of the Church as opposed to the claims of the moralist.

I therefore propose to deal with the following points;

(1). The point of view of the State (2) The point of view of the moralist, and (3) The interaction of law and morality in this particular connection.

1. Taking first the point of view of the State I conceive that the universally approved object of all divorce facilities is to promote where necessary the welfare

(a) of the family (including parents and children).

(b) where there are no children, of the spouses themselves.

(c) of the State itself.

(a) The first object of the State is to secure for all children, wherever possible, the joint care of both parents. Too often death destroys this ideal but it is equally destroyed where one of the parents is guilty of desertion or gross cruelty in any form, or becomes insane or hopelessly incapacitated by any other form of disease. The question of moral guilt is irrelevant as regards the welfare of the children except in cases where moral guilt inflicts a more serious injury upon them than death or disease would. Thus, to take an analogous instance, it is immaterial for the beneficiaries under a will or settlement whether a trustee has been sent to prison or taken to drink or drugs. In either case they want to remove him. The fact of incapacity for parenthood once fully established, the State is simply concerned with the relationship of the spouses *inter se;* this brings me to the next head of the subject.

(b) The second object of the State is to secure certain rights to the spouses *inter se,* for example, to enforce such economic rights as marriage creates for the husband or wife, as the case may be. Clearly, the wife is in most cases entitled to financial support if abandoned by the husband, and the husband is entitled to disown such obligations if abandoned by the wife. The degree to which the marriage contract has been observed or violated by either or both parties is therefore obviously bound up with the economic aspects of marriage. But the modern State has almost entirely given up the idea of interfering with the private relations of the parties, as these were and are interfered with in Catholic countries by the Catholic Church, or between 1857 and 1884 by the State in England, for example, by enforcing cohabitation on pain of excommunication or imprisonment. Divorce is naturally and in fact much rarer in cases where there are children of the marriage; and when there are not modern States will more and more recognize, as many of them already do recognize, the justice and expediency of divorce by mutual consent, subject to necessary time limits and financial safeguards. Such divorces are effected either by mutual consent *eo*

nomine, by separations maturing into divorce, or by the legal fiction of collusive divorce for collusive adultery or any other matrimonial offence. When once the question of the children has been satisfactorily decided, the relationship of the spouses becomes a purely private relationship.

(c) The welfare of the State reposes entirely on the rearing of good citizens. The State is therefore not concerned with extra-matrimonial unions except where children result. To achieve for such children equality of opportunity and decent advantages by enforcing their rights as against the parents, ought to be the first care of the modern State, and no doubt will be so when the ecclesiastical tradition of hostility to children who have had the audacity to get born without a preliminary fee to the church, grows weaker. In a few States there may exist prohibitions of remarriage for a guilty spouse; but this is no real exception to the rule I have laid down because the State cannot restrain such persons from cohabitation outside marriage.

I have roughly sketched what I believe will be the attitude of the modern State to these matters without dealing with existing divergencies in detail because I am not writing an essay on what the divorce laws of the world are or even what they ought to be. I am merely attempting to indicate where the sphere of law ought to end and the sphere of morality ought to begin. Let us therefore now consider the sphere of morality and the point of view of the moralist.

2. We may first note that the moralist in the older civilizations of the world, *i. e.*, in France, Italy, Spain, and Russia, as also in countries like China and Japan, concerns himself mainly with the question of family obligations and human happiness, and not with the question of sexual laxity *per se*. In English-speaking countries the question of sexual laxity fills the foreground of the discussion; the opponents of divorce are at pains to assert that it increases, its supporters that it diminishes, sexual laxity as if this decided the whole question. But in countries like China and Japan sexual laxity is not necessarily associated with any disregard of parental obligations, and this is also the

case in countries like Russia and the Latin countries, though it is of course an offence against the traditional morality of the Catholic Church, and probably for that reason adultery is a criminal offence in Italy and Spain. Nevertheless in these countries where women are so frequently married out of the convent to a husband on grounds of pure convenience (a fact which converted Napoleon to divorce by consent) it is not surprising to find the ancient social convention of a quasi-recognized lover, and at least an implicit if not explicit accceptance of the fact that a woman may be an excellent mother even though she and her husband are not technically faithful to each other. The desire of the English or American moralist to discuss the question of divorce from only one point of view is due partly no doubt to a certain prurience of mind common to vigorous Puritans and pious anchorites, (though this is only one of many complex factors) but mainly to the mental timidity and confusion that prevails on the whole question of sex.

The English speaking races are often accused of hypocrisy because they profoundly believe in "suggestion" as the best means of promoting good conduct and particularly what they call "purity." They think it dangerous to discuss or reason about such questions because they fear that open discussion would endanger the peace and order of their society. They are too intellectually indolent to tackle a complicated and difficult problem on its merits; they prefer a compromise whereby, having been taught as children that extra-matrimonial relations exist only in quasi-criminal circles, they conspire when older and in other respects wiser, to maintain the same preposterous fiction, and as its logical consequence the social buttress of prostitution. In a spirit of protective mimicry the transgressors against this code pay the homage of hypocrisy to what passes for virtue, and even if discovered acknowledge to themselves as well as to others the justice of their social condemnation just because they have blindly accepted this social convention all their lives. They have broken the one rule of the game which is—not to be found out.

In such a climate of opinion it is not surprising to discover that sexual laxity is the obsessing side of the problem, and that the odious aspects of chaining two incompatible persons together are completely ignored, though vividly denounced by John Milton in one of the greatest achievements of English prose.

Even were sexual laxity to be the sole test of divorce legislation the moralist is wrong because divorce laws never directly *cause* laxity. Such laxity is purely the social result of social causes; it is quite as characteristic of European society when it was built upon a theory of indissoluble marriage as it is of the ancient world or the modern State. In fact our medieval ancestors lived far more loosely than we do; they were morally purified and socially rehabilitated by confession and absolution as often as they wanted it, and where such offenders were brought before the ecclesiastical courts they were let off quite easily as I recently showed in the Fortnightly Review (May 1913). The divorce laws of ancient Rome, which were the embodiment of substantial justice and sound common sense, never became a cause of scandal until the new wine of Greek ideas burst the old bottles of Roman tradition, and even so such scandals as existed could have been prevented by substantial time limits. "*Quid leges sine moribus?*" was the very pertinent question put by Horace, and "*Quid mores sine legibus?*" is the still more pertinent question which the opponents of divorce law reform in England are incapable of answering.

The word "moralist" can of course be used both in a good and bad sense. In its ordinary sense it means the man who defends the moral code of his own time because he is unable to think of anything better than that to which he has been accustomed. Contemporary moralists may be roughly divided into Catholic, Calvinistic, and Secularist. The Catholic moralist bases his ethical opinions on Catholic tradition and the Calvinist on the traditions of Geneva—which have so profoundly influenced the English speaking world; the Secularist attempts to solve these

problems on rational or humanistic lines, though in practice he often relapses into the clerical tradition that no privacy should be too sacred for police interference. All types, however, generally combine to oppose any legal change that seems inconsistent with the prevailing code of morals. It is interesting in this connection to read the answers of the lawyers selected in each American State to the inquiries sent out by the Divorce Law Commission in England. Whether the answer comes from South Carolina, where the "standard of conjugal fidelity is so high" as to necessitate a law that no man may leave more than one fourth of his property to his mistress and illegitimate children, or from South Dakota or Nevada where the procedure is farcical and the law very happy-go-lucky, the almost invariable reply is that there is "no demand for a change in the law" and that the moral condition of the State in question could not be better. The lawyers are in this instance merely expressing their views of their clients and taking upon themselves the function of the moralist. The moralist ought to collaborate with the State but too often remains satisfied with the existing code of morals.

3. This conservative instinct of the moralist is responsible for a certain interaction of law and morality because even lawyers and legislators are occasionally in advance of their time. In the United States the tendency to experimental law-making frequently stimulates the ethical discussion of problems first presented as legal problems or even as new statutes, and there can be no doubt that if Lord Palmerston had invoked a referendum on his great Divorce Statute in 1857 it would have been strangled in its cradle. The acceptance of divorce as a fact for the richer sections of the middle class undoubtedly affected the moral code of England and in no way more than in the new ideas that began to grow in regard to the rights and duties of married women. Yet the broad fact remains that if the statute had been opposed to the main stream of ethical ideas it would have remained a dead letter just as one notices how seldom the well-to-do classes availed

themselves of the Scottish law from 1600 to 1800. It is therefore by no means clear that the moralist or even the moral philosopher is a better custodian of social morality than the lawyer or legislator, especially where that morality is complicated with religious taboos and prohibitions, and it follows that the general public should not be too easily frightened by the opposition of so called moralists; particularly when, as in the case of divorce, the lawyer proposes to do nothing more than enlarge the liberty of the subject with the full knowledge that this legal liberty will be severely controlled by purely social sanctions.

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